IN THE HIGH COURT OF UTTARANCHAL, NAINITAL.

No. 10- COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING.

[Chapter VIII, Rule 32(2) (b)]

Criminal Jail Appeal No. 55/2003

Man Bahadur … Appellant.

Vs.

State .. Respondent.

Decided on 05-8-2005

A.F.R. (Approved for Reporting)
~~Not Approved for Reporting~~

(Irshad Hussain, J.)

(Prafulla C. Pant, J.)

Dated: 05-08-2005.

In the High Court of Uttaranchal, At Nainital.
Criminal Jail Appeal No. 55/2003.

Man Bahadur S/o Nar Bahadur
R/o Village Jagarpur, P.S. and
District Surkhet, Nepal …….. Appellant.

Versus

State ……. Respondent.

Sri Kailash Tiwari, learned Amicus Curiae for the accused.
Sri Amit Bhatt, learned A.G.A. assisted by Sri Suhail A.Siddiqui, learned Brief Holder for the State.

Coram: Hon'ble Irshad Hussain, J.
Hon'ble Prafulla C. Pant, J.

Dated: 05-08-2005

(Per : Hon'ble Irshad Hussain, J.)

This is a criminal appeal against the judgment dated 7-12-2002 passed by the then Sessions Judge, Almora in sessions trial No. 23/2002.

2- Briefly stated the prosecution case was that at about 7.00 P.M. on 9-1-2002 in village Rampur, Patwari Circle Ghanshyari, Tehsil Ranikhet, District Almora, two Nepali migrant labourers Jagar Bahadur and Man Bahadur came at the house of another Nepali migrant labourer Jagat Bahadur and asked him to accompany them to settle financial account with them. Jagat Bahadur went, with these two, out of the house and on the road at a distance of about 100 yards from the house he was fatally assaulted by Khukhari. Next day on 10-1-2002 Smt. Deepa Devi (P.W.1) the wife of Bharat Singh deceased got scribed written report, Ext. Ka.1, and delivered it at the Patwari Headquarter at 7.00 A.M. F.I.R., Ext. Ka.3 was then drawn on the basis of the written report and case under Section 302 I.P.C. was registered against Jagat Bahadur and appellant-accused Man Bahadur.

3- Circle Patwari, Nandan Singh Negi (P.W.4) started investigation of the case. He recorded the statement of informant Smt. Deepa Devi and then left for the village of the incident. He

prepared the site plan, Ext. Ka.4 and held inquest on the dead body to prepare the inquest report, Ext. Ka.5. With relevant documents of the inquest and copy of the F.I.R the dead body was sent for post mortem examination. Dr. C.L. Maheshwari performed post mortem examination the same day at 1.00 P.M. and prepared the post mortem report, Ext. Ka.2. Towards further investigation Investigating Officer recorded the statement of other witnesses and arrested the accused Man Bahadur on 10-1-2002. His associate in the crime Jagat Bahadur was arrested on 20-1-2002 and at his instant Khukahri, the weapon of assault was recovered and memo, Ext. Ka.12 was then prepared. On completion of the investigation, charge sheet, Ext. Ka.13 was submitted against the accused Man Bahadur on 10-3-2002. Jagat Bahadur reported to have ran away from the District Jail.

4. The accused Man Bahadur was committed to court of Sessions on 15-4-2002 by the Judicial Magistrate, Ranikhet. The charge under Section 302 I.P.C. was framed by the then Sessions Judge against the accused on 24-4-2002. To prove the charge against the accused, prosecution examined four witnesses. P.W.1, Smt. Deep Devi, the informant of the case and P.W.2, Smt. Radha Devi were examined as witnesses of the fact to prove that the murder was committed by the accused and Jagat Bahadur. The evidence of Investigating Officer examined as P.W.4, has been referred above. Dr, C.L. Maheshawari (P.W.3), Autopsy Surgeon detected following ante-mortem injuries on the person of Bharat Singh:

1- Incised wound over scalp (skull) starting from right temporal region to left ear, encircling posterior side. Size 35cm x 8cm x brain deep. Scalp and bone clean cut. Posterior part of both lobes of brain cut and coming out.

2- Incised wound over base of skull/ nape of neck in between both ear lobules. Size 15 cm x 4cm x bone deep. Bone and major vessels cut through and through at the level of first cervical vertebra (spinal cord) medulla

oblongata cut through and through. Margins were clean cut.

3- Contusion abrasion over left (frontal) side of forehead. Size 7 cm x 4cm.

On internal examination skull bones were found cut through and through and anteriorly on left side and there was multiple fracture. Heart was empty and there was semi digested food present in the stomach. In the opinion of the Autopsy Surgeon the death was caused due to shock and haemorrhage about one day ago. The ante-mortem injuries were, according to him, probably caused by the blows of Khukhari.

5- The accused on being examined under Section 313 of the Code of Criminal Procedure pleaded not guilty and claimed that Govind Giri and Gopal Giri were instrumental in his false implication in the case on account of a dispute over a house with them. No evidence was adduced by him in defence.

6- Learned Sessions Judge made appreciation of the evidence of the prosecution and accepted the evidence of P.W.1, Smt. Deepa Devi wife of deceased Bharat Singh as reliable and sufficient to prove the involvement of the accused in the murder of her husband. In the opinion of the Sessions Judge the evidence of P.W.1 was amply corroborated by the F.I.R. as well as the medical evidence in the case. Evidence of P.W.2 was accepted in proof of the incriminating circumstance that accused was standing with the deceased out side the house of the deceased some time before the murder. On the basis of the evidence the accused was held guilty, convicted and sentenced to undergo imprisonment for life under Section 302 I.P.C. per judgment under appeal.

7- Learned counsel for the appellant persuasively argued that the learned Sessions Judge fell in error in accepting the evidence of the prosecution regarding the alleged circumstance of last seen of the deceased in the company of the accused and that even otherwise the evidence of P.W.1 and P.W.2, the two witnesses of the fact being highly discrepant and shaky could not have been relied upon to satisfactorily establish the circumstance pressed in to service by

the prosecution. Learned counsel submitted that in the absence of clear, cogent and unimpeachable evidence none can be held guilty of serious crime of murder on the basis of mere suspicion and that the learned Sessions Judge not only failed to take this legal aspect of the matter in to consideration but also placed implicit reliance on the evidence of P.W.1, Smt. Deepa Devi, the widow of the deceased in spite of the fact that her statement was neither here nor there to prove any incriminating circumstance against the accused. On the other hand learned A.G.A. and Brief Holder for the State submitted that the inference drawn by the learned Sessions Judge was based on proper and fair appraisal of the evidence of P.W.1 and P.W.2 which was corroborated by the F.I.R. and the medical evidence of the accused and therefore the sole circumstance of last seen pressed in to service by the prosecution was sufficient to bring home guilt to the accused and who has therefore rightly been held guilty and convicted for committing the murder of Bharat Singh.

8- The evidence of the prosecution therefore need to be analyzed in the above backdrop and to see as to whether the alleged circumstance of last seen stand satisfactorily proved by the evidence of the two witnesses P.W.1 and P.W.2 so as to saddle the accused with the responsibility of committing the crime.

9- P.W.1, Smt. Deepa Devi stated that on the day of the occurrence at about 6 - 6.30 P.M. while she and her husband were in the house accused Man Bahadur and his companion Jagat Bahadur made a call to her husband and asked her husband to accompany them on the pretext that they have made an arrangement of the money which was to be paid to her husband. According to her, her husband then left the house and went away with the accused and his companion. Later on one Sher Bahadur called her to tell that the murder of her husband had been committed. She then raised an alarm in the vicinity of her house and reached at the scene of the incident where she found her husband lying dead in a pool of blood. She had not found the accused there at that place and claimed that she was told that

accused Man Bahadur was sleeping in his house and whereas Jagat Bahadur had fled away from there.

10- In the cross-examination the witness claimed that she had seen her husband Bharat Singh being given blows of Khukhari and on seeing the assault she fell unconscious. She however stated in the next breath that at that time she was engaged in preparing food in her house and that her husband was murdered at a distance of about 200 paces from her house. She also stated that a man came to call her husband from the house and whereas another person gave Khukhari blows from the back of her husband and this way her husband was killed. According to her all this was told to her by Sher Bahadur. She denied to the suggestion that the accused and his companion Jagat Bahadur have not called at her house as stated to in the evidence.

11- From the above it is obvious that the statement of the witness was not consistent and cogent about the identity of the two men who came to her house to take her husband with them. Although she gave the names of the accused and his companion Jagat Bahadur in the examination-in-chief but in cross-examination she could not name any of them and stated that a man came to summon her husband and whereas another man assaulted her husband by wielding a Khukhari. This information was given to her by Sher Bahadur. This shows that everything was told to her by Sher Bahadur who incidentally was not examined as a witness in the case. had the accused and Jagat Bahadur were to come to call her husband she must have told their names in the cross-examination and would not have merely said that a man came to her husband from the house.

12- Even otherwise it does not appear probable that in case accused Man Bahadur and his companion Jagat Bahadur owe some money to Bharat Singh then they would not have paid the money due at the house of Bharat Singh and instead asked Bharat Singh to accompany them from the house so that the money arranged be paid to him out side the house. Considering this aspect also we do not think that implicit reliance could have been placed on the highly

shaky and discrepant evidence of this witness that accused and one of his companion came there at her house and took with them Bharat Singh some time before the alleged occurrence.

13- The evidence of witness Smt. Radha Devi (P.W.2) also could not be placed on better footing. According to her Bharat Singh deceased was the tenant in the house of her mother-in-law. The witness was residing else-where away from the house of her mother-in-law in which Bharat Singh deceased was the tenant. She claimed to have visited the house of her mother-in-law at about 5.30 P.M. on 9-1-2002 to inquire about her children. On reaching the house of the mother-in-law she was informed that her children have already left the house and she then went back to her own house. She stated to have seen accused Man Bahadur all alone in the way. She later on claimed that she also saw accused Man Bahadur coming to the house of Bharat Singh deceased and then both of them were standing at the door of the house. The witness however went ahead to reach to her house. After some time she was informed by some one that Bharat Singh the tenant of her mother-in-law, had been murdered. According to the witness the dead body of deceased was found lying at a distance of about 10-15 paces from the house of her mother-in-law. This distance was stated to be about 200 paces by other witness P.W.1 Smt. Deepa Devi. The place where the dead body was lying was shown by letter ‘A’ in the site-plan, Ext. Ka.4 by the Investigating Officer. The house of the deceased was shown by letter ‘B’. The place of the incident is the motorable road between Karanprayag and Ganai and other residential houses were shown situated on the two sides of the road. According to P.W.2 there were groves of the villagers on both the sides of the road where the dead body of Bharat Singh was found. No grove has been shown in the site plan. Even if this aspect may not be said to be material in regard to the claim made by the witness it is however of significance that if the witness had returned to her house from the house of her mother-in-law soon after 5.30 P.M. on 9-1-2002 she was not expected to encounter or meet accused Man Bahadur on the way. In case Man Bahadur was seen

some where on the way to her house it could not be expected that she also later on saw the accused with Bharat Singh deceased at the door of the house of Bharat Singh. Moreover according to the prosecution case and evidence of P.W.1, two men came to call at Bharat Singh to take him with them but this witness gave out that only accused Man Bahadur came there at the house of Bharat Singh and was seen standing there at the door. This contradiction and inconsistency in the statement further create grave suspicion and doubt in the veracity of the evidence of the witness and her evidence could not have been taken to corroborate the evidence of the informant P.W.1. As submitted by the learned counsel for the accused we also can not lose sight of the fact that according to the version of the F.I.R. and evidence of P.W.1, the two men came to call at the house of Bharat Singh deceased some time before 7.00 P.M. and probably round about 6.30 P.M. whereas P.w.2 gave out that Man Bahadur was seen on the way at about 5.30 P.M. on that day and it was not expected of P.W.2 to have remained there around the house of Bharat Singh for about an hour to later on found that accused Man Bahadur was also standing with Bharat Singh at the door of the house of Bharat Singh. This infirmity also tell upon not only the credibility of the evidence of P.W.2 but also create further suspicion and doubt in the claim of the prosecution and also its evidence.

14- Upon consideration of the evidence of both these witnesses we have no hesitation in coming to the conclusion that the learned Sessions Judge failed to appraise the evidence of these witnesses in proper perspective which resulted in drawing an incorrect inference that the deceased Bharat Singh was lastly seen alive in the company of the accused and that too soon before the occurrence. The name of witness Sher Bahadur surfaced in the evidence of P.W.1 as the person who gave her information about the murder of the husband but stated above he was not examined in evidence by the prosecution for the reasons best known to it. This instance could have been taken to draw an adverse inference against the prosecution and the learned Sessions Judge in our view ignored that

important aspect of the case. it is said that the evidence was corroborated by the version of the F.I.R. but again it was also very significant that P.W.1 did not name the person who scribed the written report, Ext. Ka.1 on her dictation. The name of the scribe was not mentioned in the written report and the prosecution also did not examined the scribe in evidence whereby the defence was deprived of the opportunity to question the integrity of the scriber and also to bring on record as to whether it was really the informant P.W.1 who dictated the written F.I.R. prepared after the incident on coming to know that her husband had been murdered. In a situation like this the F.I.R. was not also a piece of evidence to be taken to corroborate the oral evidence in the case. In the face of the facts of the case the medical evidence alone would not have been taken to create and incriminating circumstance against the accused and his implication in the commission of the crime. 15-

15. Considering the facts and circumstances of the case we do not find ourselves in agreement with the inference drawn by the learned Sessions Judge that the circumstantial evidence of last seen was satisfactorily established against the accused by the evidence of the prosecution. The evidence of the witnesses being discrepant and shaky was not in fact sufficient to prove this alleged incriminating circumstance against the accused. And even otherwise it was highly hazardous to place reliance on the evidence of alleged incriminating circumstance of last seen without any supporting or corroborating evidence either circumstantial in nature or otherwise and on that account also it was a fit case in which the charge against the accused could not have been held to be proved beyond reasonable doubt. Therefore, the benefit of doubt should have been extended to the accused of the case.

16- In result this appeal succeed and is to be allowed. The appeal is hereby allowed. The accused Man Bahadur is extended the benefit of doubt and is hereby held not guilty of the charge under Section 302 I.P.C. The judgment and order dated 7-12-2002 is set aside. The accused is in jail and he shall be released forthwith, if not wanted in any other connection.

17- Let the record be sent back to the court concerned for compliance to be reported to the court within one month.

(Prafulla C. Pant, J.) **(Irshad Hussain, J.)**

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